

New York State Office of Victim Services

Crime Victim's Compensation and the Issue of Restitution



Presented by the Office of Victim Services

Legal Unit

WHO WE ARE



Office of Victim Services

- Independent Office of the Executive
- Approximately 100 employees in Albany, Brooklyn and Buffalo
- Provides compensation to innocent victims of crime and funds direct services to victims through a network of community-based programs funded by federal fines, fees and forfeitures and state court surcharges

WHAT WE PAY...

- Essential personal property \$500 (\$100 cash max)
- Medical Expenses not covered by other insurance
- Counseling services
- Occupational rehabilitation expenses
- Lost earnings or support up to \$600 per week - maximum of \$30,000
- Burial expenses up to \$6,000
- Cost of services of domestic violence shelter
- Transportation expenses for necessary court appearances
- Crime scene cleanup to \$2,500
- Moving Expenses to \$2,500
- Attorney fees for representation before the Board (max \$1,000)

Eligibility

Innocent victim of a crime physically injured as a result of the crime

- Contributory Conduct
- Cooperation with law enforcement
- Personal physical injury (exceptions)
- File w/in one year of crime

Payer of Last Resort

- Awards reduced by the amount of any other kind of insurance including workers compensation and public funds
- OVS is payer of last resort

Liens, Subrogation and Restitution

- Acceptance of award subrogates OVS to any right of action to recover losses resulting from crime
- Creates a lien in favor of OVS on proceeds of any recovery against a party liable for the injury giving rise to the award

Son of Sam Law

Requires notice to OVS of profits or funds of a convicted person-OVS required to Notice victims

- Victims may sue inmate
- Commenced within 3 yrs of victim's receipt of notice
- Injunction to freeze funds on behalf of the victim

What is Restitution ?

Penal Law 60.27:

- The fruits of the perpetrator's offense
- Actual, out-of-pocket loss of victim

IDENTITY THEFT

- For a victim of identity theft, restitution can include losses or costs incurred by a victim or anyone who suffered a financial loss
- Effective Jan. 2009: the restitution can include an amount equal to time spent to remediate harm incurred by victim and financial losses from any adverse action caused to the victim

Penal Law 60.27(4)(b); 60.27 (1); Ch. 279 Laws of 2008

Criminal Justice Evolution

- Relationship between government and the offender
- *The Theory of Restorative Justice*
A movement to expand the circle of stakeholders to include the VICTIM and the community

Restitution is a key element

- Actual loss
- Recognition of offender's criminal responsibility
- The absence of blame or fault on the part of the victim
- Validation

Who Qualifies?

- Any victim of an offense
- Office of Victim Services (when it pays victim's expenses)

Compensable losses

- Replacement of Stolen items
- Repair costs of damaged items
- Medical expenses including professional **counseling** expenses and medical transportation
- Sick leave costs, lost wages

Penal Law §60.27

- Authorizes restitution in addition to any other disposition
- Definitions: PL 60.27
 - Offense - part of criminal transaction or included in complaint/indictment - even if disposed of by plea
 - Victim - expanded beyond the individual - covers corporations, municipalities, insurance companies etc.

Example of Part of Criminal Transaction

- Defendant charged with Assault and Resisting Arrest
- Each of the victims of above crimes may recover through restitution even if defendant pleads to Assault in satisfaction of all charges

Responsibilities of the District Attorney

- **The District Attorney shall advise the court at or before sentencing of:**
 - **Extent of victim's injury**
 - **Amount of victim's economic loss**
 - **Amount of any damages**

Responsibilities of the Court

- The Court **SHALL** consider restitution to the victim
- The Court **SHALL** require the defendant make restitution if requested
- Judge must state on the record, reasons for **not** ordering restitution PL§60.27(1)

Court's Responsibilities cont'd

- **The Court MUST be able to make a finding of a specific dollar amount**
- **MAY direct that the entire amount be paid at sentencing, or**
- **A later date, or that it be paid at specified intervals at specified amounts CPL 420.10**

- Court may not delegate its duty to determine amount of restitution

People v. Fuller, 57 NY2d 152 (1982)

- Each defendant is jointly and severally liable

People v. Kim, 91 NY2d 407 (1988)

Limits on the Amount of Restitution

PL 60.27(5)(a)

Felony	\$15,000
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Non-felony	\$10,000
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Juvenile	\$1,500
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PINS	\$1,000
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THE COURT MAY NOT GO BEYOND THESE LIMITS unless,

- 1. Defendant consents, or**
- 2. Restitution is made a Condition of Conditional Discharge or Probation, or**
- 3. Amount represents return of victim's property (including money or "equivalent") or actual medical expenses**

Restitution Limits cont'd

- \$1,500 limit in a juvenile proceeding may not be juvenile's total restitution liability

In the Matter of Joel M., 240 A.D.2d 747
(App. Div. 2nd Dep't 1997)

- An order of restitution does not effect any possible civil action for amounts in excess of the order

PL 60.27(6)

- An order of restitution to a person survives the death of that person and the remaining payments go to the victim's estate

Penal Law 65.10(g)

- Imprisonment authorized until the defendant pays restitution for:

CPL 420.10(3,4)

- felony - up to one year
- misdemeanor – up to 1/3 maximum
- petty offense – up to 15 days

- Even if defendant is imprisoned for failure to pay or served the period of imprisonment imposed, the order, as a civil judgment, may be collected by the victim

CPL 420.10(6)(a)

- Courts can use possibility of imprisonment as an incentive for defendants to make restitution

People v. Amorosi, 96 NY2d 180(2001)

- Remedy if the defendant is unable to pay – RESENTENCING the Court may:

CPL 420.10 (5)

- adjust the amount of restitution
- adjust the period by which the defendant must pay restitution
- revoke that part of the sentence pertaining to restitution
- sentence defendant to any originally authorized sentence (can't increase the amount of restitution)

- Incarceration alone is not enough to determine that the defendant is unable to pay CPL 420.10(5)
- Failure to pay-Court may issue a warrant
CPL 420.10(3)
- Cash bail to be used to pay restitution
CPL 420.10(1)(e)
- Court SHALL direct the DA to file the order with county clerk to be entered in the same manner as a civil judgment
CPL 420.10(6)

Victims Still Shoulder the Burden of Loss

- NIJ estimated cost of crime to victims (medical expenses, earnings VAP costs), about \$105 billion/yr.
- State compensation programs pay out approximately \$453 million/yr to victims
- Most of the costs of crime still absorbed by victim

More

- More than 25 million Americans become victims of crime each year
- Survey of victims entitled to restitution (Nat'l Center for Victims of Crime) found that less than half actually awarded restitution

WHY?

- Victims don't know they're entitled to it
- District Attorneys do not always request it
- Judges reluctant to order in addition to incarceration or in view of defendant's apparent inability to pay

Mandatory Nature of PL 60.27

- The Court **shall** consider restitution to the victim and may **require** restitution as part of a sentence imposed...
- The DA **shall**, where appropriate, advise the Court that the victim seeks restitution...
- The court **shall** hear the DA and receive VIS and **shall** consider the information
- The court **shall** order Restitution unless the interest of justice dictates otherwise

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Myth #1

Victims simply fail to request Restitution
most of the time

- Not notified of their right to restitution
- Notified too late in the process to gather sufficient evidence
- Court has obligation to inquire whether restitution has been considered and authority to order even in the absence of specific request

Myth #2

No Dollar Amount- No Order

- DA required to request information from the victim, Courts have the authority to order a ***pre-sentence investigation*** and report in every case
- If inconclusive, Court may adjourn, set hearing & order a pre-sentence report
- Even if PSI waived, if Court determines relevant, Victim Impact Statement must be provided CPL 390.20(4)(b)

Myth #3

Restitution inappropriate in light of incarceration

- PL 60.27 effective September 1, **1980**:
“In addition to any other disposition authorized” [by law] the Court shall consider and may require restitution as a part of the sentence imposed

Myth # 4

Defendant is indigent therefore restitution is inappropriate

- Present inability to pay bears only manner of payment and not the amount
- OVS pays victims up front and agrees to collect nominal restitution amounts
- Current and future financial resources overlooked-prison wages, deposits to inmate discretionary accounts, judgments and settlements, inheritance, lottery, fraudulently transferred assets, cash bail

Civil Judgment

- CPL 420.10 requires that Restitution Orders be filed as civil judgments - not all DA's are complying-this mandate must be outlined in the order
- When Criminal Justice System fails to collect, adequately compensate, or loses jurisdiction, the victim may still pursue his civil remedy
- OVS may pursue judgment enforcement proceedings civilly on behalf of victim under subrogation authority

Civil Judgment cont'd

- When restitution order becomes a civil judgment it becomes a first lien upon real property over most other liens.

CPL 420.10(6)(a) and (b)

- Exceptions:
 - Liens on behalf of a governmental entity
 - Purchase money interest in the property

Restitution and Bankruptcy

- Restitution obligations are not dischargeable in bankruptcy in any type of bankruptcy, Chapter 7, Chapter 11 or Chapter 13
 - Chapter 7, Kelly v. Robinson, 479 U.S. 36 (1986)
 - Chapter 11, 11 U.S.C. 1129(a)(8)(B)
 - Chapter 13, 11 U.S.C. 1328(a)(3)

Looking forward Possible Solutions

- Coordinated agency approach that includes the Board, Probation, DA and the Courts
- Improving communication and inter-agency data exchange through single system that tracks Restitution orders and payment from PSI to paid
- Educational Outreach

Food for thought

- PA allows DA's to procure restraining orders to preserve Defendant's assets specifically for restitution
- CA-separate felony offense to dispose of property to avoid paying restitution
- Montana inmates forfeit amount in excess of \$200 accumulated in an inmate account to pay outstanding restitution
- California/Arizona require offenders file financial reports/affidavits to probation as to their expenses and ability to pay

Conclusion

- Hold offenders financially responsible for harm caused-Court has authority to order restitution in every case
- Criminal justice system should promote victim's recovery by acknowledging their role in the process, validating their victim status and assigning accountability through restitution orders
- *Restitution...*
...it's the law, and it's the right thing to do

Additional information, resources, contacts

- ovs.ny.gov
- dpca.state.ny.us
- criminaljustice.state.ny.us
- parole.state.ny.us
- docs.state.ny.us
- opdv.state.ny.us
- navaa.org
- nacvcb.org

Discussion Questions:



OFFICE OF VICTIM SERVICES

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ovs.ny.gov